Supreme Court, U.S.
FILED

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

CARL L. JIMENA, Petitioner,

v.

111 ZUMA CORPORATION, (DBA) FRONTIER HOTEL
Respondent.

On Petition For Writ Of Certiorari To The
Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

CARL L. JIMENA,
In Propia Persona
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North Edwards, California 93523
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QUESTION PRESENTED:

WAS THE PETITIONER DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN THE PROCEEDINGS BEFORE THE CALIFORNIA COURT OF APPEAL?

PARTIES

The above caption in this case contains the names of all parties involved in this case.

Respondent was represented in the Superior Court of Los Angeles, California by Atty. Robert G. Pierce, 235 East Broadway, Suite 940, Long Beach, California, Tel. No. 562-590-8820. The latter attorney together with Atty. Charlotte E. Costan, 1220 Country Club Drive, Burbank, California 91501, Tel. No. 818-842-8932 represented respondent in the California Court of Appeals. Atty. Charlotte E. Costan argued the case for respondent in the California Court of Appeal against petitioner who argued in his own behalf. Respondent had no appearance before the California Supreme Court.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

CARL L. JIMENA, the petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of California filed May 12, 2004, Case No. S123357, denying review of the judgment of the California Court of Appeals, Case No. B162246, entered and filed on February 9, 2004.

OPINIONS BELOW

The California Supreme Court denied the petition for review filed before it by petitioner by an order, without any opinion, copy of which is attached herein as Appendix A.

The opinion of the California Court of Appeals, (hereinafter referred to as Court of Appeals for the sake of brevity) whose judgment is herein sought to be reviewed, was entered and filed on February 9, 2004 in case No. B162246 and was ordered unpublished., copy of its opinion is attached as Appendix B. The default judgment of the Superior Court of Los Angeles, California, without any finding of facts and no opinion is attached as Appendix C.

JURISDICTION

The order of the Supreme Court of California was entered and stamped filed on May 12, 2004 (Appendix A) and jurisdiction of this Court is invoked pursuant to 28 USCS. §1257(a) which provides:

> "(a) Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ....where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any

commission held or authority exercised under, the United States."

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND CASE LAW INVOLVED

1) Fourteenth Amendment, Sec. l:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United states and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2) Case law of Bertero v. National General Corporation, 13 C. 3d 43, 65, footnote 12, reproduced herein as footnote 7.
3) Case law of Cunningham v. Simpson 1 C. 3d 301, 308, 309, cited in Bertero v. National General Corp., supra, at p. 64:

> "where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice, the duty is then imposed on the court to act."

4) Case law of Uva v. Evans, 83 Cal. App. 3d 356, 363-364, is quoted on p. 4, Appendix B, Decision of the Court of Appeals.
5) California Code of Civil Procedure, §1908(a)(1) - Appendix D
6) California Rules of Court, Rule 2 (a) (1) - Appendix E
7) California Code of Civil Procedure §473 - Appendix F
8) California Code of Civil Procedure §657 - Appendix G
9) California Code of Civil Procedure §585 (b) - Appendix H
10) Calif.Code of Civil Proc. §1010, quoted on page 4, Appendix B
11) California Civil Code §3359:

> **Damages to be reasonable.** Damages must, in all cases, be reasonable, and where an obligation of any kind appears to

create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

STATEMENT OF THE CASE

This is a petition for a writ of certiorari directed to the California Supreme Court denying review of the decision of the Court of Appeals, where the constitutional issue arose, affirming the award of the Superior Court of Los Angeles, California in the amount of $18,000 for three successive crimes committed in one night against petitioner, one theft and two robberies resulting in a very serious injury to petitioner while he was a guest at respondent hotel.

Procedural History:

Petitioner filed a complaint for personal injury in the Superior Court of Los Angeles, California based on contract and negligence. (Clerk Transcript hereinafter abbreviated as CT p. 8, 12).claiming in his statement of damages served on defendant $400 for property loss, $2,000 for loss of earning, $5,000 for medical expenses, $20,000 for future medical expenses, $100,000 for emotional distress, $150,000 for pain, suffering, and inconvenience, $100,000 for humiliation, $250,000 for physical injuries and eye injuries, and $300,000 in punitive damages.(CT p. 24) Default was entered (CT 119) and judgment rendered against respondent in the amount of $18,000.(CT p. 174) Petitioner appealed to the Court of Appeals contending that respondent had no stganding and that for three crimes committed against petitioner, the award is "unjust" as provided for by §585 (b) California Code of Civil Procedure (Appendix H) and that the award is out of proportion with the injury and offense, and that petitioner is entitled to punitive and future medical expenses.(Brief filed in Court of Appeals) The Court of Appeals affirmed the award of the Trial Court. (Appendix B) Petitioner filed a petition for review in the California Supreme Court arguing that the Court of appeals was so

unfair in its proceedings, violating due process and equal protection of the law among others still allowed respondent to appear after it has lost jurisdiction over respondent who had no standing, exercised arbitrary discretion without any standard in determining that the award is not disproportionate to the injury and offense and likewise petitioner is entitled to punitive and future medical expenses. (Petition for Review, Calif. S.C.) The California Supreme Court denied review of petitioner's case. (Appendix A) Hence, this petition for a writ of certiorari before this Court.

Facts:

On March 8, 2002 petitioner filed a lawsuit against respondent alleging causes of action for breach of contract and negligence. (CT p. 8, 12) He alleged that he was a victim of three successive crimes in one night consisting of one theft, one robbery of the wallet with serious physical injuries and robbery of his cell phone.(CT p. 8)

The complaint alleged that on April 16, 2001, petitioner checked in at respondent's hotel and was assigned a room which unknown to him had a defective door lock. This allowed a thief to enter the room while petitioner was asleep and stole his eye-glasses and green bag containing various items.(CT p. 8)

Petitioner called police and reported the theft to hotel management. The police officer who took petitioner's report stated that he found the door lock inoperative and told petitioner that management would install a new lock. While petitioner waited in his room, a robber came who said he is from management. The robber told him to turn around. When he did so, the robber treacherously hit the back of his head knocking him down. continuing to punch both eyes many times until his left eye was bleeding. (CT p.8, p. 28-29, par. 10, 11; attack similar to Greenfield v. Spectrum etc. infra) After petitioner was able to stand up, he went to the elevator. "While waiting at the elevator and calling 911", a man robbed his cell phone.(CT p. 8, complaint, par. #3)

Petitioner alleged in his complaint that "defendant don't

want to install deadbolt locks as reflected in its rules and regulations." (CT p. 9) By this allegation respondent is aware of the dangerous consequences of its conduct but deliberately ignored the need for safe locks. Likewise, respondent was already aware that the lock was inoperative thru the police officer yet the respondent "failed to change the lock promptly and immediately." (CT p. 9) Again respondent was already aware of the dangerous consequences of an inoperative lock but deliberately ignored it. Other allegations of the complaint to the same effect is that "defendant failed to warn plaintiff of the presence of dangerous persons or possible criminals or that similar crimes had occurred in the vicinity. (Clerk Transcript p. 9); "Defendant failed to notice or take action against suspicious persons in the premises. After the occurrence of the two robberies, ...plaintiff.... while waiting in the ground floor ...was pointing at the cell phone robber who was on the ground floor but the security officer took no action and just told plaintiff to keep quiet." (Clerk Transcript p. 9) This shows another instance of conscious disregard for the safety of petitioner. Petitioner further alleged inadequate security and poor lighting, respondent failed to exercise a higher degree of protection because plaintiff is a senior citizen, respondent has no closed circuit television, respondent has only one security guard for twelve floors. (CT p. 9) From the totality of the ten allegations of duty of care of respondent in the complaint (CT p. 9) which were all admitted by respondent as a result of entry of default and default judgment (Horton v. Horton, infra,) they exhibited a conscious disregard of the safety of petitioner; they also exhibited that respondent was aware of their dangerous consequences and yet respondent deliberately failed to avoid those consequences. They constitute malice entitling petitioner to punitive damages.(Silberg v. California Life Ins. Co. 11 Cal. 3d 452, 462)

REASONS FOR GRANTING THE WRIT

The instant petition for writ of certiorari should be granted for

the main reason that the California Court of Appeal violated due process and equal protection of the law based on the following:

I. Due process under the Fourteenth Amendment, U.S. Constitution was infringed by the California Court of Appeals -

A. In not acting as an impartial tribunal in this case.

. .. 1. By transgressing the California Code of Civil Procedure §1908(a)(1).(Appendix D)

The default judgment already became final and res adjudicata with respect to respondent when it failed to appeal the default judgment (Calif. Code of Civil Procedure, §1908(a)(1); Appendix D) Horton v. Horton [1941] 18.C 2d 579, 585) sixty days from notice of its entry by the Clerk of the Superior Court of Los Angeles, California, the last day falling on November 25, 2002(Calif. Rules of Court, Rule 2(a)(1);Appendix E) Clerk Transcript, California Court of Appeals, B162246, p. 174, it is presumed that the Clerk of Court did his job sending the notice). After November 25, 2002 and beginning November 26, 2002, the Court of Appeals lost jurisdiction over the defendant. (Calif. Code of Civil Proc. §1908(a)(1), Appendix D) Yet, the California Court of Appeals, without anymore any legal authority under any law, still allowed respondent to appear and file a brief in this case over the express objection of petitioner.(p. 3, Appendix B, footnote 2) This exhibits partiality, is a transgression of fair play or due process and against the constitutional principle of equality in the application of the law. (Truax v. Corrigan, infra,257 U.S.312, 331 [1921]).

In trying to justify respondent's standing in

this case, the Court of Appeal cited the case of Misic v. Segars, 37 Cal. App.4th 1149 that respondent "can attack the default judgment in the trial court by motion for new trial." (p. 4, Appendix B) This is not correct because (1) it is irrelevant for the purpose of deciding the standing of respondent since no motion for new trial is filed in this case and that problem should be handled when it is filed (2) the statement in Misic v. Segars, supra is obiter dictum. In the latter case the-

> " question presented is whether an order setting aside a default judgment qualifies as a new trial order for purposes of Code of Civil Procedure section 583.320, which provides a three-year period within which to again bring the matter to trial when a new trial is granted by the trial court or ordered by an appellate court. fn. 1. We conclude it does not." (Misic v. Segars, supra, at p. 1151) "A defaulting defendant could ask the trial court for a new trial, at least under certain circumstances. If granted section 583.320, subdivision (a) (2) would arguably give plaintiff three years from the date of the order to bring the latter to trial. As that scenario is not before us, however, we do not decide that issue." (Misic v. Segars, supra, at p. 1151)

(3) Aside from being obiter dictum, the California Supreme Court already ruled that as to the question of liability, a motion for new trial is not available after a default judgment. In Carney v. Simmonds 49 C. 2d 84, 90, 315 P. 2d 305,[1951] the California Supreme Court held:

> "We conclude therefore that a motion for

> a new trial is proper procedure in any of the classes of judgments mentioned in the first group of cases above cited whether the judgment is based on law or fact or both, except possibly in the case of default judgments or judgments by agreement or confession where there may be a question of the right of the moving party to make any objection to the judgment."

The above ruling in Carney v. Simmonds, supra, was reinforced in the case of Jacuzzi v. Jacuzzi Bros., Inc. 243 Cal.App 2d 1, 20-21, [1966] where the Court held as follows:

> "The distinction between an ordinary default judgment which is predicated on the failure of a party to appear by answer or other pleading, or at a trial xxxx and a default judgment ordered by the court as a penalty xxx warrants further analysis. A review of the former type of judgment by the trial court generally involves application for relief under provisions of §473 of the Code of Civil Procedure (Appendix F) because of mistake, inadvertence, surprise, or excusable neglect, and relief by motion for new trial would be inappropriate and foreclosed because there has been no issue either of fact or law, or both, which was resolved before judgment. xxx"

As to damages, the ground that can be invoked for new trial after a default judgment is that it is excessive. (Don v. Cruz 131 Cal App 3d 695, 698, 704) As far as petitioner's case is concerned being one of default judgment, none of the seven grounds for new trial under the California Code of Civil

Procedure §657 (Appendix G)is present in this case and this is not a case of excessive damages. Based on the above discussion, a motion for new trial in this case is foreclosed.

To justify further respondent's standing in this case, the Court of Appeals cites the case of City Bank of San Diego v. Ramage 266 Cal. App. 570, 582[1] that after attacking the default judgment by motion for new trial, respondent may appeal the judgment. (Appendix B, p. 3) This is incorrect. Respondent has only one chance of appealing the default judgment and the same case of *City Bank of San Diego* is the authority that respondent has no second chance to appeal the default judgment. Having failed to appeal in this case, there is no more appeal to the default judgment.

2 .By disregarding the prevailing great weight of Supreme Court decisions and Court of Appeals precedents and just to fit this case formulated its own rule for the first time, that respondent can appear. (p. 3, Appendix B)

In several cases, the California Supreme Court held which is obviously binding on the Court of Appeals that in default cases, the respondent is already out of court (Howard Greer Custom Originals v. Capritti [1950] 35 Cal. 2d 886, 889[2]; 221 P. 2d

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[1] The case of City Bank of San Diego v. Ramage, 266 Cal App 570, 582, held: "A defendant against whom a default judgment has been taken has a right to appeal from it [citation]" "Generally on such an appeal attack is confined to jurisdictional matters and fundamental pleading defects [citation]"]

[2] The default cut off defendants from making any further opposition or objection to the relief which plaintiffs complaint shows he is entitled to demand. A defendant against whom a default has been entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action; he cannot therafater, until such default is set

937; Title Ins. Co. v. King Land & Improv. Co.[1912] 162 Cal. 44,46 120 P. 1066; Strong v. Shatto [1927], 201 Cal. 555, 558;Citizens Nat'l Trust & Sav. Bank v. Holton, [1930] 210 Cal 44,46, 290 P. 447; In re Estate of Wiechers (1926) 99 Cal 523, 527, 250 P. 397; Christopherson v. French,180 Cal. 523, 525; 182 P. 27; [1919][3]) but the California Court of Appeals refused to apply them in this case and made its own rule for the first time just to favor respondent contradicting the aforecited decisions of the California Supreme Court and contrary to the constitutional principle of equal application of the law. (Truax v. Corrigan [1921] 257 U.S. 312, 331 Hirabayashi v. U.S. [1943] 320 U.S. 81, 100) The rule that defendant is already out of court in this case for being in default is the same in the following Court of Appeal cases: J.M. Wildman, Inc. v. Stults [1959 2nd Dist] 176 Cal App 2d 670, 673; Heathman v. Vant [1959 2nd Dist] 172 Cal. App 2d 639, 647; Holsinger v. Holsinger [1950] 95 Cal App 2d 835, 837; Taintor v. Superior Court 95 Cal App 2d 346, 350-351)

The California Court of Appeals interpreting Section 1010, California Code of Civil Procedure (quoted on p. 4, Appendix B)stated that it refers to notices, not appearance. This is not correct. It refers to appearances as held by the California Supreme

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aside in a proper proceeding, file pleadings or move for a new trial, or demand notice of subsequent proceedings....[citation] If the judgment were vacated it would be the duty of the court immediately to render another judgment of like effect, and the defendants still being in default, could not be heard in opposition thereto....[citation]" (at p. 888-9)

[3] "A defendant against whom a default is entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action."

Court in the cases quoted in footnote 2 and 3. If the interpetation of the Court of Appeals is correct, why did it not remove respondent from the service list?(see foonote 2, p. 3, Appendix B) Here the Court of Appeals holding in words is contrary to its action.

3. By describing the second crime in this case against petitioner as theft, instead of robbery of the cell phone (par. 2, p. 2, Appendix B)

The complaint alleges: "3) Robbery of the cell phone, While waiting at the elevator and calling 911 in plaintiff's cell phone, another man put his arms around plaintiff and grabbed his cell phone." (Calif. Court of Appeals, Clerk Transcript, B162246, p. 8) This allegation is admitted by respondent being in default. (Heintzsch v. La France, 3 C 2d 180, 183 [1935], Holland v. Kodimer, 11 C 2d 40, 45, 77 P 2d 843] This means that when the man placed his arms around plaintiff, the man tied up plaintiff with his arms then grabbed the cell phone, meaning force was used to take the cell phone and it was taken without the consent of the plaintiff to prevent the latter from calling the police. This characterizes the crime as robbery, not theft.

4. By ordering its own decision in this case to be unpublished to prevent this case from being cited by text writers as the opposite result of the case of Bertero v. National General Corp. 13 Cal App 3d 43 (1974), .

Witkin commented that as a result of *Bertero* case,(and other cases) abolishing the standard of comparison with similar cases, large judgments were awarded. (6 Witkin, Summary of California Law, Torts, (1988,) §1478, p. 948) But had this case been published, Witkin would be able to

cite this case that the opposite result likewise resulted from the decision of Bertero v. National General Corp., supra, which is that very small award was given to a minority as the petitioner. Likewise, Stein, an authority on personal injury, (Stein, Personal Injury (1997) 2d Ed, Digest of Awards, Vol. 4) would never be able to possibly include this case in the fourth volume of his work, "Digest of Awards" because this case is unpublished. The Court of Appeals did not want this case to be seen by text writers around the USA as a very small award compared to similar cases such as Greenfield v.Spectrum Inv. Corp, 174 CA 3d 111 (1985). decided by the California Court of Appeal where the manner of assault was similar. This is not the first time the Court of Appeals ordered a decision involving the petitioner to be unpublished. In the other case Carl L. Jimena v. Clifford Brad Alesso et. al., 36 Cal App 4th 1028 to which petitioner was also the appellant, the Court of Appeals ordered a part of the decision to be unpublished. Likewise, a third case, a companion to this case, Jimena v. 111 Zuma Corp.etc., Court of Appeals Case No. B163780, the decision was also ordered unpublished. Three cases to which petitioner was a party show a pattern of discriminating against petitioner because of his Philippine race, also an evidence of partiality.

One of the basic elements of due process is that the decision maker be impartial,(Goldberg v. Kelly [1970] 397 U.S. 254, 471; Marshall v. Jerrico, Inc. (1980) 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L. Ed. 2d 182, Carey v. Piphus, [1978] 435 U.S. 247; 259-62, 266-67, 98 S. Ct. 1042, 55 L. Ed 2d

252; Mathews v. Eldridge, [1976] 424 U.S. 319, 344, 96 S. Ct. 893, 47 L. Ed 2d 18; Joint Anti-Fascist Refugee Committee v. McGrath, [1951] 341 U.S. 123, 172, 71 S. Ct. 624, 95 L. Ed. 817) The preceding four grounds, I,A, 1-4 show that the element of impartiality by the Court of Appeals was absent in this case.

B. In not stating the reasons why the award is not disproportionate to the evidence of injury.

The attached decision, Appendix B, does not even mention the evidence of injury suffered by petitioner as shown by medical records, a violation of one of Justice Brennan's requisite of due process which states: "the decision maker should state the reasons for his determination and indicate the evidence he relied on...." (Goldberg. v. Kelly 397 U.S. 254, 271 [1970]. How can the Court of Appeals say that the award is not disproportionate with the evidence of injury when the injuries suffered by petitioner is not even mentioned in the decision? The appellant suffered: (1) head trauma for being struck at the back of his head (CT p. 42) (2) lacerated bloodied eye requiring four stitches (CT p. 51-53); (3) permanent damage of posterior vitreous detachment on both eyes and cataract that could lead to total blindness (CT Supp. p. 4-5; CT p. 57, 60) (4) pain and suffering from being knocked down on the floor (CT p. 28) (5) and from many punches on his face (CT B162246 p. 28) par. 10, (6) chronic post traumatic stress disorder (PTSD), severe anxiety, severe depression (7) continuing fear of becoming blind. (CT p. 31, 110)

C. In deciding petitioner's case, the Court of Appeals exercised arbitrary discretion without referring to any standard such as comparison of awards in similar cases to show reasonableness.(BMW of North America v. Gore 135 L. Ed 809;826[4]

The statutory law in California is Code of Civil Proc. §585(b) (Appendix H) and California Civil Code §3359, (quoted on p.2-3hereof). Petitioner invoked the rule that the award must not be grossly disproportionate to the (evidence of) injury. (Cunningham v. Simpson 1 Cal d 301, 308, 309, cited in Bertero v. National General Corp., supra, at p. 64; Uva v. Evans, 83 Cal App 3d 3356, 363-364 [1978]; cited at p. 4, Appendix B) identical to the rule in BMW of North America v. Gore, 134 L. Ed. 809, 826, 831, that the award must not be disproportionate to the harm.[5] The rule of determining the excessiveness/inadequacy ratio between award and injury/harm is being applied by this U.S. Supreme Court in punitive damages but the same rule is being invoked in California with respect to compensatory damages as stated in the case of Uva v. Evans, supra.. While this U.S. Supreme Court stated the guidepost to determine excessiveness (or inadequacy), as a safeguard to arbitrary discretion, among which is determination of reasonableness by comparison of

[4] "We can say, however, that [a] general concer[n] of reasonableness properly enter[s] into the consitutional calculus." BMW etc. v. Gore, supra, 134 L. Ed. 809, 831

[5] "punitive awards may not be wholly disproportioned to the offense." Bmw etc. v. Gore, supra, 134 L. Ed. 809, 826; "punitive damages may not be grossly out of proportion to the severity of the offense." (BMW etc. v. Gore, supra, 134 L.Ed. 809, at p. 827)

awards in similar cases,[6] the California Supreme Court removed the safeguard or standard to the exercise of arbitrary discretion by abolishing comparison of awards in similar cases as laid down in the case of Bertero v. National General Corp., *supra*, page 65, footnote 12.(reproduced herein at fn.7)

Whether it is punitive or compensatory damages, what we are concerned here is prevention of arbitrary discretion by using standards or safeguards, since arbitrary discretion could be exercised both in punitive and compensatory damages, both subjects being covered by the Fourteenth Amendment. The California Supreme Court in removing the standard of comparison of awards in similar cases, abrogated well-established protection against arbitrary deprivations of property and had raised a presumption that its procedures violated Due Process Clause (Honda Motor Co. v. Oberg, (1994) 512 US 415, 430,)

The California Supreme Court after abolishing the former standard quoted hereunder, replaced it with the "passion and prejudice standard" (Bertero v. National Gen. Corp., supra, at p. 64) This standard does not satisfy the Fourteenth Amendment on due process and equal protection of the law because it is no standard at all. The reason was stated in the often quoted words of Chancellor Kent: "The damages,

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[6] Three guidepost to excessiveness: "degree of reprehensibility" or ratio to actual harm inflicted; "disparity between the harm or potential harm... and award;" "the difference between this remedy ... and ... penalties ... in comparable cases" (BMW etc. v. Gore, supra, 134 L. Ed. 809, 826) or "comparison of the punitive damages with civil and criminal penalties that could be imposed for similar misconduct" third guidepost restated by Chester James, Antieau & William J. Rich (1997) Modern Constitutional Law, 2d Ed, §35.27, p. 357.

> "therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess."(Beasley v. Ford Motor Co. 237 SC 506, 512) cited by 22 Am Jur 1069)

The reason of Chancellor Kent means that in between high and low there is no standard. The correct standard satisfying the Fourteenth Amendment is the standard that the California Supreme Court abolished stating that awards in similar cases should be used as a guide similar to the guidepost laid down in BMW of North America, Inc. v. Gore, supra. This correct standard was laid down in Maede v. Oakland High School District 212 C 419, 425; 298 P. 987 (1931): The "average amount for particular injuries, as fixed by the verdicts rendered by juries and approved by courts" offers a standard, though not an invariable one, and that where the compensation for loss of a limb or eye, e.g. greatly exceeds such average award, it may be held excessive. (See 6 Witkin, id, supra, p. 947)

If passion and prejudice is a constitutionally acceptable standard, then this Court should have used it in BMW of North America, Inc. v. Gore, infra, But instead of passion and prejudice standard, this Court used the method of comparison in the third guidepost of excessiveness or inadequacy in the BMW etc. case. recognizing that passion and prejudice is not a constitutionally appropriate standard or a vague

standard.

In the attached decision of the Court of Appeals. Appendix B, it said that petitioner's "argument is supported by citation to other cases, decided and reported in California and Elsewhere, in which, he contends, that facts and injuries were similar the verdicts larger....." (Appendix B, p..4) We may not decide this appeal by using those awards as benchmarks." (Appendix. B, p. 5) Here is where the California Court of Appeals exercised its arbitrary discretion rejecting standards or safeguards forbidden by the Fourteenth Amendment. (BMW of North America Inc. v. Gore, 134 L Ed 809, 826, 831, 833 1996], Justice Breyer's reason quoted at p. 19 hereof)

Recognizing the unfairness of the Bertero rule, footnote 7 herein, one case decided by the Court of Appeals , Bihun v. AT&T Information Systems (1993) 13 Cal. App. 4th 976, 997, deviated from the Bertero rule and still applied the comparison standard approach (similar to the third guidepost of BMW v. Gore, supra,) in Maede v. Oakland High School District, supra, 212 C 419, 425).

Petitioner's discussion above is well supported by decisions of this U.S. Supreme Court. Due process tends to secure equality of law. "Our whole system of law is predicated on the general fundamental principle of equal application of the law." (Truax v. Corrigan [1921] 257 U.S. 312, 331 Hirabayashi v. U.S. [1943] 320 U.S. 81, 100)) The Fourteenth Amendment safeguards fundamental rights of persons and property against arbitrary and oppressive state action (Thomas Cusack Co. v. Chicago [1917) 242 US 526, 529 61 L Ed 472, 37 S Ct 190) There is a fundamental federal interest in protecting an

individual citizen from state action that is wholly arbitrary and irrational. (Honda Motor Co. v. Oberg, 512 U.S. 415, 114 S. Ct. 2331, 129 L. Ed 2d 336) Touchstone of due process is protection of individual against arbitrary action of government. (Wolf v. McDonnell[1974] 418 U.S. 539, 558 Every state official high and low is bound by the Fourteenth Amendment. (U.S. v. Raines [1960] 362 U.S. 17, 25 including officials of the judicial department of the state (Barrow v. Jackson 346 U.S. 249, 253 reh'g denied 346 U.S. 841; Mooney v. Holohan, 294 U.S. 103, 113 reh denied 294 U.S. 732) which includes the California Court of Appeals.

Petitioner's existing right of action to recover damages from his injuries is property protected by due process clause (Sec. 1, 14th Amendment, U.S. Constitution; Angle v. Chicago St Paul, M&D Ry., 151 U.S. 1, 19 (1894) This right of petitioner was violated by the California Court of Appeals because petitioner was deprived of property, right of action to recover damages, without due process of law as discussed above.

II. Equal protection of the law was violated in this case.

The following doctrines are applicable to this case:

"no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process or law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition;" (Re Virginia, 100 US 339,

347 [1889])

"The primary reason for that [14th] amendment was to secure the full enjoyment of liberty to the colored race is not denied, yet it is not restricted to that purpose, and it applies to everyone ....that comes within its provisions" (Maxwell v. Dow, 176 US 581, 593 (1900)

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is to prevent state action which discriminates on the basis of race or color. (Washington v. Davis 426 U.S. 229, 239 [1976]; Ham v. South Carolina 409 U.S. 524, 527 [1973]; Palmer v. Thompson 403 U.S. 217, 220; Loving v. Commonwealth of Virginia 388 U.S. 1, 12 [1967]; McLaughlin v. State of Florida 379 U.S. 184, 192 [1964]

Petitioner was denied the equal protection of the law by the California Court of Appeals in not finding that the award was disproportionate to the injury as shown by standards comprising of awards in comparable cases.

The Court of Appeals in refusing to find that the award is disproportionate to the injury as shown by comparison of cases, reasoned out that the amount of damages is a factual question for the jury to decide, here by the trial judge sitting as a jury, , citing the case of Bertero v. National General Corp., supra, (cited, p. 5, Appendix B). This reason is incorrect because here is where exactly a standard or safeguard is needed to guide the jury as a restraint to arbitrary discretion. Justice Breyer, joined by Justice O'connor and Justice Souter, explained this in his concurring opinion in the case of BMW of North America v. Gore, supra , quote:

"The reason flows from the Court's emphasis in *Haslip* upon the constitutional importance of legal standards that provide reasonable constraints' within which 'discretion is exercised,' that assure 'meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages,' and permit appellate review [that] makes certain that the punitive

damages are reasonable in their' amount and rational in light of their purpose to punish what has occurred and to deter its repetition." (BMW etc. v. Gore, supra, 134 L. Ed. 809, 833-834; 517 U.S. 559, 587)

On the other hand, please compare petitioner's case in the manner of treatment with Greenfield v. Spectrum, 174 Cal App 3d 111 (185) where the manner of assault is similar. There is no other reason but petitioner's race who is of Asian/Philippine origin as seen in person ;by the Court of Appeals during the oral argument. (This case was argued before the California Court of Appeals on Feb. 3, 2004, Appendix I) In addition to petitioner's race is also his age being now 69 years old (Court of Appeals, Clerk Transcript B162246, p. 27)

Without using a standard or safeguard as a restraint on the exercise of discretion, lower courts or juries could make high, better or low awards depending on a person race, ethnic origin, age, sex religion and other considerations. Here, petitioner obtained a low award because of his race and age. It is clear petitioner's right to equal protection of the law was violated.

The rule in the case of Bertero v. National General Corp., supra, [7] is being used as a sword to cut the rights of minorities as

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[7] "Defendants have compiled a lengthy list of judgments awarding damages which have been r eversed on appeal as excessive. Those cases do not, in and of themselves mandate a reversal here. The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jurys factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon differenct evidence could constitute a serious invasion into the realm of factfindg. {citation} Thus, we adhere to the previously announced and historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice on the part of the jurors.xxxx" Bertero v. National Gen. Corp., supra, at p. 65

demonstrated in this case. Petitioner pray that the rule in the Bertero case be declared overruled by the prevailing practice and ruling of this U.S. Supreme Court in the case of BMW v. Gore, supra requiring reasonableness (see footnote 4) in determining the ratio between the award and evidence of injury/offense and requiring standards by way of comparison of awards in similar cases.(see footnote 6) The Bertero rule "fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between person in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (Yick Wo v. Hopkins, 118 U.S. 356 373-374 [1886]).

The Court of Appeals intent to discriminate is exhibited by deciding arbitrarily without using standards that the award is not disproportionate to injury (I, C above), by allowing respondent to appear in this case against §1908(a)(1), California Code of Civil Procedure since the judgment already became final as to respondent and therefore the latter has no clear standing in this case (I, A above), by going against past decided cases in California that respondent in default could no longer participate further in the case and had to strain itself engaging in a pattern of reasoning to favor respondent as discussed above (I, A above). by applying the wrong law to the facts with reference to the question of standing of respondent (I, A above),by erroneously characterizing the second crime against petitioner as theft, instead of robbery (I, A, 3 above), by not stating the reasons why the award is not disproportionate to the injury (I, B above), by ruling and interpreting that §1010, California Code of Civil Procedure refers to notices yet refused to strike the name of respondent from the service list - its holding contrary to its action,(I, A, 2 above) by ordering its decision to be unpublished so that text writers such as Stein, (author of Stein on Personal Injury [1997] 2d Ed., Digest of Awards, Vol. 4) could not possibly include this case in his Vol. 4, Digest of Awards and Witkin, (author of Summary of Cal. Law 8th ed. 1984, Torts) would not be able to pick up the Court of

Appeals decision for a possible commentary that petitioner's case is the opposite result of the Bertero decision for being possibly the lowest award.(I A, 4 above) All of the above enumerated negative actions of the California Court of Appeals are so unfair and constitute invidious discrimination in violation of the equal protection of the law. (Loving v. Commonwealth of Virginia 388 U.S. 1, 10 [1967]) An invidious purpose may often be inferred from the totality of relevant facts including the fact that the rule in the Bertero case bears more heavily on one race than another. (Washington v. Davis, 426 U.S. 229, 242 [1976] compare the award of petitioner with the award of plaintiff in the case of Greenfield v. Spectrum, supra, where the manner of assault is almost identical), The difference in the treatment of this case as detailed above from other cases such as Uva v. Evans, supra, Johnson v. Stanhiser, 72 Cal App 4th 357 [1999] Greenfield v. Spectrum, 174 Cal App 3d 111 [1985] is (in the latter cases the appellate court was impartial, here the Court of Appeals was not impartial) invidious discrimination.[8] A strict scrutiny of the Court of Appeals decision is due. Cases supporting petitioner's statement are cited hereunder.

The central mandate of the Equal Protection Clause is racial neutrality in governmental decision making. (Justice Kennedy in Miller v. Johnson 515 U.S. 900, 903). The Equal Protection Clause thus bars a governing body from applying a law dissimilarly to people who are similarly situated. (Bratton v. City of Florence 688 So. 2d 233 [Ala. 1996]; Truax v. Corrigan, supra, p. 333) Discrimination against citizens by reason of race or color violates the federal Constitution (Nixon v. Herndon, 273 U.S. 536, 541, 71 L.Ed. 759) and are inherently suspect subject to strict judicial scrutiny or most regid scrutiny (Loving v. Commonwealth of Virginia 388 U.S. 1, 11, 18 L. Ed. 2d 1010 [1967]; Korematsu v. 323 U.S. 214, 216 89 L. Ed 194 [1964])

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[8] American Party of Texas v. White, 415 U.S. 767 (1974) reh. denied, 416 U.S. 1000 (1974Levy v. Louisiana 391 U.S. 68,71-72 (1968) reh. denied 393 U.S. 898 (1968); Loving v. Virginia, 388 U.S. 1, 11 (1967)

If the petitioner was not denied due process and equal protection in this case, petitioner could have obtained the just damages required under California Code of Civil Procedure Sec. 585(b). (Appendix H)..

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

CARL L. JIMENA
In Propia Persona
14774 Desert View Ave.
North Edwards, CA 93523

Dated: 7-24-04

Appendix A

Court of Appeal, Second Appellate District,
Division Five - No. B162246
S123357

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CARL L. JIMENA, Plaintiff and Appellant,

v.

111 ZUMA CORPORATION, Defendant and Respondent

Petition for review DENIED.

SUPREME COURT
FILED
May 12, 2004

Frederick K. Ohlrich
Clerk, Deputy
(Stamped filed)

Appendix B

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a). prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

CARL L. JIMENA,
Plaintiff and Appellant,

v.

111 ZUMA CORPORATION,
Defendant and Respondent.

B162246

(Los Angeles County,Sup. Ct. No. BC269653)

Court of Appeal-Second Dist. FILED FEB 09 2004
JOSEPH A LANE, CLERK
(stamped filed)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth A. Grimes, Judge. Affirmed.

Carl L. Jimena, in propia persona, for Plaintiff and Appellant.

Law Offices of Robert G. Pierce and Robert G. Pierce; Charlotte E. Costan for Defendant and Respondent.

On March 8, 2002, plaintiff and appellant Carl Jimena filed a lawsuit against the Zuma Corporation, bringing causes of action for negligence and breach of contract.[1] Factually, the complaint alleged that plaintiff was the victim of theft and violent crime while staying at the Frontier Hotel, a residential hotel owned by defendant.

[1] On our own motion, we have taken judicial notice of the Superior Court's File in this case. Plaintiff has also filed a motion to correct the clerk's transcript. We deem this a motion to augment the record with the documenets attached to that motion, and grant it.

Specifically, the complaint alleged that on April 16, 2001, plaintiff checked in at the hotel and was assigned a room which, unbeknownst to him, had a defective door lock. The defective lock allowed a thief to enter the room while plaintiff was asleep. Plaintiff's glasses and other items were stolen.

Plaintiff called police and reported the theft to hotel management. The police officer who took plaintiff's report told him that management would install a new lock. While plaintiff waited, he was attacked and beaten by a man who represented himself as a management employee. When plaintiff left his room to report that crime, he was accosted by another man, who stole his cell phone.

Plaintiff alleged that respondent breached its contract and its duty of care in that it had inadequate security, poor lighting, and defective door locks; failed to notice or take action when suspicious persons were on the premises; failed to warn plaintiff of the presence of criminals or that similar crimes had taken place.

The complaint listed the damages as approximately $35,000 in medical expenses and future medical expenses, $2000 in loss of earnings, $400 in property loss, and $250,000 for physical injury.

In May, plaintiff filed a statement of damages. He again sought $400 for property loss and $2,000 for loss of earning. He also sought $5,000 for medical expenses, $20,000 for future medical expenses, $100,000 for humiliation, $250,000 for physical injuries and eye injuries, and $300,000 in punitive damages.

Plaintiff filed a request for entry of default which was rejected on procedural grounds, but in August, after he filed a new request, a default was entered by the clerk. In connection with his statement of damages and requests for entry of default, plaintiff filed a declaration in which he described the crimes, his injuries, his medical treatment and his theory of the case. He also filed the police report on the initial theft, hospital records concerning his treatment on and after April 17, and the declarations of an ophthalmologist, security consultant, and psychologist.

The ophthalmologist opined that the serious injuries to plaintiff's eyes which began on April 17 were caused by blunt trauma at the Frontier Hotel and that plaintiff "will experience a high probability of lifelong visual complications that could ultimately lead

to total blindness." The security consultant opined about the duty hotels owe to their customers and concluded that the Frontier Hotel's failure to maintain the lock was a breach of that duty and was below the standard of care. The psychologist opined that, based on a July, 2002 evaluation of plaintiff, the traumatic events of April 16 and 17 had caused a significant psychological injury, so that plaintiff required psychological treatment.

Plaintiff requested a judgment in the amount of $928,381.58, including $25,072.58 in special damages, $600,000 in general damages, and $300,000 in punitive damages. Judgment was entered on September 26, in the amount of $18,072.58, plus costs.

On this appeal, plaintiff contends that the trial court erred by refusing to award punitive damages or future medical expenses, and that the damage award must be reversed because it is too low. We see no grounds for reversal, but before we reach the issue of the amount of damages, we must first discuss plaintiff's contention that because the Zuma Corporation defaulted in the trial court it should not be allowed to participate in this proceeding.

In support of his argument, plaintiff cites cases which hold that "The entry of a default terminates a defendant's rights to take any further affirmative steps in the litigation until either its default is set aside or a default judgment is entered." (Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1948) 155 Cal.. App.. 3D 381, 385-386; Brooks v. Nelson (1928) 95 Cal. App. 144, 147-148.) The cases, and the rule, have been criticized. The better rule seems to be that a defendant in default may act. Such a defendant can attack the default judgment in the trial court by motion for new trial (Misic v. Segars (1995) 37 Cal. App. 4th 1149) and indeed may appeal the judgment. (City Bank of San Diego v. Ramage (1968) 266 Cal. App. 2d 570, 582; 9 Witkin & Epstein, Cal. Procedure (4th ed. 1997) Appeal, §193.) We thus see no reason why the defendant here should be prevented from filing a brief in support of the trial court ruling.[2]

Nor are we persuaded by Code of Civil Procedure section 1010, which plaintiff also cites. That statute provides, inter alia that

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[2] It was for this reason that we denied appellant's motion to remove defendant from the service list and bar its participation in the proceedings.

"No bill of exceptions, notice of appeal, or other notice or paper, other than amendments to the pleadings, or an amended pleading, need be served upon any party whose default has been duly entered or who has not appeared in the action or proceeding." The statute concerns service of notices, not appearances on appeal.

As to the amount of damages, plaintiff argues that the only question before us is one of law, so that a de novo standard of review applies. We do not, however, see any issue of law. Code of Civil Procedure section 585, subdivision (b) provides that on a plaintiff's application for a default judgment, "the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum (not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115), as appears by such evidence to be just."

Under the statute, the trial court's task was to review plaintiff's evidence and determine the just damages. The trial court was thus the finder of fact. "The determination of the amount of damages to be awarded as compensation for personal injuries is a matter within the province of the jury and will not be interfered with unless an abuse of discretion clearly appears. The same rule applies to a case, as here, where the trial judge sits as the trier of facts without a jury." (Knight v. Fitch (1937) 22 Cal. App. 2d 252, 254.) "An appellate court may interfere with that determination only where the sum awarded is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption [citations] or where the award is so out of proportion to the evidence that it shocks the conscience of the appellate court [citations]" (Uva v. Evans (1978) 83 Cal. App. 3d 356, 363-364.)

Plaintiff contends that the evidence supported his claims of $400,000 for pain, suffering, inconvenience and physical injury, and $300,000 for emotional distress, so that the lesser award must be reversed. His argument is supported by citations to other cases, decided and reported in California and elsewhere, in which, he contends, the facts and injuries were similar and the verdicts larger. However, "The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same

scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of fact-finding." (Bertero v. National General Corp. (1974) 13 Cal. 3d 43, 65, fn 12.) We may not decide this appeal by using those awards as benchmarks.

Instead, we review the entire record. Having done so, we cannot say the award is so disproportionate to the evidence as to suggest that the verdict was the result of passion, prejudice or corruption, or that it shocks the conscience of this court. We cannot find that the trial court abused its discretion, or that, as plaintiff contends, the evidence compelled the trial court to order the full amount plaintiff requested. For instance, although plaintiff produced evidence that he suffered injury to his eye, and evidence that after the crimes he had nightmares, depression, and other symptoms, his expert psychologist reported that at time of the examination plaintiff was oriented and had no cognitive or memory impairment, and his ophthalmologist gave only a general declaration concerning plaintiff's current and potential medical problems.

Nor can we agree with plaintiff that the trial court erred by failing to make an award for future medical expenses. First, the trial court did not specify the components of the award, so that we may not say that there was no award for future medical expenses. More importantly, nothing in the expert's declaration substantiates plaintiff's claim for $20,000 in future medical expenses or indeed even estimates future medical expenses.

Plaintiff also contends that the court erred in refusing to award punitive damages, arguing that the person or persons who robbed and beat him acted intentionally, and were cruel and merciless. He contends that punitive damages should be assessed against defendant because those acts were the consequence of its negligence, citing the rule that "A person who wrongfully omits to perform a particular act required of him is liable in damages for all of the consequences which, in the natural course of events, may ordinarily ensue therefrom." (Valdez v. Taylor Automobile Co.

(1954) 129 Cal. App. 2d 810,821.) We do not believe that the cited principle would allow punitive damages to be assessed here. Instead, punitive damages may be assessed only where the "defendant has been guilty of oppression, fraud, or malice." (Civil Code, §3294.) There is no such showing in this case.

Finally, plaintiff contends that his damage request in the trial court was too low, and asks that we order an additur so that the damages in this case approximate those in Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal. App. 4th 976. We may not however, grant damages in excess of those requested in the statement of damages. (Code Civ. Proc. §585, subd (b).)

Disposition

The judgment is affirmed. The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J.

MOST, J

Appendix C

ATTORNEY OR PARTY WITHOUT ATTORNEY (*Name and Address*):	*For Court Use Only*
Telephone No. Carl L. Jimena 714-273-0054 P.O. Box 2318 California City, CA 93505-9998 Attorney for (*Name*) Paintiff, Pro Se	FILED, La Sup. Ct. Sept. 26, 2002 J. Bacon, Deputy
NAME OF COURT, JUDICIAL DISTRICT OR BRANCH COURT, Superior Court of California, County of Los Angeles 111 North Hill St., Los Angeles, CA 90012	
PLAINTIFF: Carl L. Jimena DEFENDANT: 111 Zuma Corporation, DBA Frontier Hotel, Does 1-7	
DEFAULT JUDGMENT BY THE COURT Case No. 269653	

It appearing that defendant, 111 Zuma Corporation DBA Frontier Hotel having been regularly served with process, having failed to appear and answer plaintiff's complaint filed herein, and the default of this defendant having been duly entered; on application of plaintiff to the court, and after having heard and considered the evidence,

IT IS SO ORDERED that plaintiff have and recover judgment from defendant 111 Zuma Corporation DBA Frontier Hotel, in the sum of $18,072.58 [principal or damages]; attorneys fees in the sum of $ 0 ; and plaintiff's cost and disbursements in the sum of $3,300.00; together with interest on the judgment as provided by law.

September 26, 2002, Los Angeles, California.

(Sgd)
ELIZABETH A. GRIMES
Judge

Appendix D

California Code of Civil Procedure, §1908(a)(1):

> **"§1908. Conclusive effect of a judgment in various cases**
> (a) The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:
> (1) In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

Appendix E

California Rules of Court, Rule 2, (a) (1):

"Rule 2. Time of filing notice of appeal

(a) [Normal time] Except as otherwise provided by Code of Civil Procedure section 870 or other statute or rule 3, a notice of appeal from a judgment shall be filed on or before the earliest of the following dates: (1) 60 days after the date of mailing by the clerk of the court of a document entitled 'notice of entry' of judgment; (2) 60 days after the date of service of a document entitled 'notice of entry' of judgment by any party upon the party filing the notice of appeal, or by the party filing the notice of appeal; or (3) 180 days after the date of entry of the judgment. For the purposes of this subdivision, a file-stamped copy of the judgment may be used in place of the document entitled 'notice of entry'. (Subd (a) as amended effective July 1, 1992; adopted effective July 1, 1943; previously amended effective September 17, 1965, January 1, 1982, September 22, 1982, January 1, 1986, January 1, 1990.)

(b) [What constitutes entry] For the purposes of this rule: (1) The date of entry of a judgment shall be the date of its entry in the judgment book or, in a county following the procedure specified in Code of Civil Procedure section 668.5 in lieu of maintaining a judgment book, the date of filing the judgment with the clerk pursuant to that section. .....".

Appendix F

California Code of Civil Procedure, §473:

§473. Amendment of pleadings
[(a) (1) and (2) omitted concerns amendment of pleadings]

"(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. .....[portion dealing with judgment concerning real or personal property omitted]..... No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to section 583.310."

Appendix G

California Code of Civil Procedure, §657

"**§657. Grounds for new trial; Requisites of order granting new trial for insufficiency of evidence.**

The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial,

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive or inadequate damages.

6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.

7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision."

[portion of the statute dealing with requirements of the court order on new trial and appeal omitted

Appendix H

(Appendix H & I, this page)

California Code of Civil Procedure, §585(b)

§ 585. **Judgment if defendant fails to answer complaint**

"(b) In other actions, if the defendant has been served....and no answer....has been filed .... the clerk .... upon aplication .... shall enter the default.... the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum (not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115), as appears by such evidence to be just."

Appendix I

California Courts - Appellate Court Case Information - Docket Entries (page 4 of 4) (only pertinent portion copied)

02/03/2004	Cause argued and submitted	
02/09/2004	File returned to county clerk	One vol. (BC269653)
02/09/2004	Opinion filed	The court on its own motion take judicial notice of the Superior Court file in this case. Plaintiff's motion to correct the clerk's transcript is granted with the documents attached to the 6-24-03 motion
03/15/2004	Petition for review in Supreme Court received	
03/17/2004	Record transmitted to Supreme Court	
05/12/2004	Petition for review denied in Supreme Court	